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WHEN A HANDICAP MAY BE AN ADVANTAGE:
*MCPHERSON v. MICHIGAN HIGH SCHOOL ATHLETIC
ASSOCIATION* EVALUATES THE RELATIONSHIP OF THE
REHABILITATION ACT AND THE ADA TO ATHLETIC
ASSOCIATION MAXIMUM SEMESTER RULES

I. INTRODUCTION

There is an alarming trend in many high school athletic programs to place competitiveness substantially ahead of academic concerns.¹ In an effort to help curb this tendency, high school athletic associations usually maintain eligibility requirements for student athletes.² While these regulations serve an important policing function in high school athletics, they can be detrimental to students with disabilities who are unable to progress at a regular rate through the school system.³ Since these disabled students are typically older or have spent more time in school, regulations often curtail their athletic eligibility.⁴

Over the past few years, several students with disabilities used the court system to try to preserve their athletic eligibility.⁵ In these

1. See WALTER CHAMPION, FUNDAMENTALS OF SPORTS LAW § 16.7 (1990 & Supp. 1996). Common practices include redshirting and recruiting students to transfer from one school district to another. See *id.* For a detailed discussion of the practice of redshirting, which involves holding back a student academically for athletic purposes, see *infra* notes 77-83 and accompanying text.

2. See *id.*

3. See *infra* notes 118-54 and accompanying text.

4. See GLENN M. WONG, ESSENTIALS OF AMATEUR SPORTS LAW 322 (2d ed. 1994) (discussing how extra years often needed by disabled students to complete their education force many of them to exceed age limit for athletic competition).

For example, a mentally disabled student may need to repeat a couple of grades in school. By the time a student becomes an academic junior, he or she may have already celebrated his or her 19th birthday. The student will become ineligible to compete in interscholastic sports if the athletic association has a maximum age limit of 18 years-old.

5. See DR. HERB APPENZELLER, THE RIGHT TO PARTICIPATE: THE LAW AND INDIVIDUALS WITH HANDICAPPED CONDITIONS IN PHYSICAL EDUCATION AND SPORTS 143 (1983) (commenting on increasing number of handicapped individuals seeking redress in court). For examples of these cases, see *Johnson v. Florida High Sch. Activities Ass'n, Inc.*, 102 F.3d 1172 (11th Cir. 1997) (granting injunction against enforcement of maximum age rule against disabled student after finding possible reasonable accommodation); *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026 (6th Cir. 1995) (holding age-eligibility rule was neutral regulation that was valid under Rehabilitation Act and ADA); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994) (permitting enforcement of maximum age rule against learning disabled student); *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, No. 89-6450, 1990 WL 104036, at *1 (6th Cir. July 25, 1990)

cases, the students typically allege that the athletic association rule violates the plaintiff's rights under section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act)⁶ and the Americans with Disabilities Act (ADA).⁷ Courts are divided on whether or not a disabled student can use the Rehabilitation Act and the ADA to circumvent eligibility regulations.⁸

The Sixth Circuit assessed the applicability of the Rehabilitation Act and the ADA as a basis for challenging a maximum semester regulation in *McPherson v. Michigan High School Athletic Association, Inc.*⁹ In *McPherson*, Dion McPherson, who had recently been diagnosed with a learning disability, wanted to play varsity basketball for Huron High School but the athletic association's maximum semester rule precluded his participation.¹⁰ The district court granted an injunction that allowed him to play basketball, but the Sixth Circuit determined that the lower court should not have provided McPherson with a waiver pursuant to the Rehabilitation Act and the ADA.¹¹

This Note analyzes how the ADA and the Rehabilitation Act affect the efforts of disabled students to participate in high school athletic programs. Section II of the Note reviews the Rehabilitation Act, the ADA and how courts have interpreted their application to

(allowing handicapped student to play sports due to Rehabilitation Act despite transfer rule); *Dennin v. Connecticut Interscholastic Athletic Conference*, 913 F. Supp. 663 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996) (enjoining athletic conference from denying disabled student waiver of maximum-age rule); *Reaves v. Mills*, 904 F. Supp. 120 (W.D.N.Y. 1995) (upholding application of age rule under ADA); *Hoot v. Milan Area Schs.*, 853 F. Supp. 243 (E.D. Mich. 1994) (finding genuine issue of material fact as to whether MHSAA violated disabled students' rights under the Rehabilitation Act and ADA); *Booth v. University Interscholastic League*, No. Civ. A-90-CA-764, 1990 WL 484414, at *1 (W.D. Tex. Oct. 4, 1990) (extending preliminary injunction against enforcement of 19 year-old eligibility rule based on likelihood of plaintiff prevailing on merits of Rehabilitation Act claim); *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418 (E.D. Pa. 1982) (permitting student's request for injunction to permit his participation in sport season); *University Interscholastic League v. Buchanan*, 848 S.W.2d 298 (Tex. Ct. App. 1993) (determining that allowing participation in athletics was reasonable accommodation and over-19 rule violated Rehabilitation Act).

6. 29 U.S.C. § 794 (1994). For the text of section 504, see *infra* note 21.

7. 42 U.S.C. §§ 12101-12213 (1994).

8. See *supra* note 5. For a discussion of the differing court treatments of the Rehabilitation Act and the ADA's relation to athletic association eligibility rules, see *infra* notes 118-54 and accompanying text.

9. 119 F.3d 453 (6th Cir. 1997).

10. *Id.* at 456. He sought a waiver from the rule but the Michigan High School Athletic Association (MHSAA) refused his request. See *id.* at 456-57.

11. See *id.* at 458, 463-64.

athletic eligibility requirements.¹² Section III discusses the relevant facts in *McPherson*.¹³ Section IV examines the Sixth Circuit's opinion in *McPherson*.¹⁴ Finally, Section V considers the potential impact of the *McPherson* decision on future cases involving the athletic eligibility of disabled students.¹⁵

II. BACKGROUND

The advent of federal legislation aimed at eliminating disability discrimination raises questions regarding the application of athletic regulations to handicapped students.¹⁶ Subpart A of this section examines the Rehabilitation Act and the ADA. Subpart B explores age and semester-based athletic eligibility requirements and then considers the relation between the federal statutes and these regulations.

A. Disability Legislation

1. *Rehabilitation Act of 1973*

As a means to help eliminate the various obstacles faced by the disabled, Congress enacted the Rehabilitation Act of 1973.¹⁷ For the millions of Americans with disabilities,¹⁸ the Rehabilitation Act aims to provide assistance in various aspects of everyday life.¹⁹ Specifically, the Act targets discrimination by recipients or participants

12. For a discussion of the Rehabilitation Act, see *infra* notes 17-48 and accompanying text. For a discussion of the ADA, see *infra* notes 49-74 and accompanying text. For a discussion of athletic eligibility requirements in general, see *infra* notes 75-117 and accompanying text. For a discussion of the application of the Rehabilitation Act and the ADA to eligibility requirements, see *infra* notes 118-54 and accompanying text.

13. See *infra* notes 155-76 and accompanying text.

14. See *infra* notes 177-245 and accompanying text.

15. See *infra* notes 246-50 and accompanying text.

16. See *infra* notes 118-54 and accompanying text.

17. See S. Rep. No. 93-318 (1973), reprinted in 1973 U.S.C.C.A.N. 2076, 2078-79. The Committee on Labor and Public Welfare believed that it was "necessary to emphasize that the final goal of all rehabilitation services was to improve in every possible respect the lives as well as livelihood of individuals served" *Id.*

18. See DON FERESH & PETER W. THOMAS, COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT, A GUIDEBOOK FOR MANAGEMENT AND PEOPLE WITH DISABILITIES 7-8 (1993) (citing NATIONAL INSTITUTES OF HEALTH, REPORT OF THE TASK FORCE ON MEDICAL REHABILITATION RESEARCH (1990)). Approximately forty-three million Americans have disabilities including 5.7 million who are mentally retarded. See *id.*

19. See Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1090 (1995) (noting that section 504 of Rehabilitation Act is key to "enabling persons with disabilities to participate in the fullness of daily life in this country").

in federally funded programs.²⁰ Section 504 of the Rehabilitation Act provides that programs or activities receiving federal financial aid may not exclude otherwise qualified individuals solely due to the plaintiff's disability.²¹

In order to make a general claim under the Rehabilitation Act, a plaintiff must demonstrate four factors.²² The plaintiff must prove: (1) he or she is "handicapped" under the Act, (2) he or she is "otherwise qualified" for the position sought, (3) he or she was excluded from the position sought solely by reason of his or her handicap, and (4) the program or activity in question receives fed-

20. See HENRY H. PERRITT, AMERICANS WITH DISABILITIES ACT HANDBOOK 105-06 (1990) (discussing purpose and target of Rehabilitation Act).

21. 29 U.S.C. § 794 (1994). This section, in pertinent part, provides:

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20) system of vocational education, or other school system;

...

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Id.

22. See *infra* note 23 and accompanying text.

eral financial assistance.²³ If the four factors are present, the plaintiff has demonstrated a violation of the Rehabilitation Act.

The first requirement is that the plaintiff is an "individual with a disability."²⁴ The Act defines a disability as a physical or mental impairment which "substantially limits one or more of such person's major life activities."²⁵ Federal regulations further state that major life activities involve the use of one's senses, the thought process and the ability to carry on in everyday life.²⁶ Therefore, a plaintiff meets the first requirement of a Rehabilitation Act claim by having this type of a substantial limitation on a major life activity.

Next, the plaintiff must show that he or she is "otherwise qualified" for the program.²⁷ The test for establishing this factor was expressed by the Supreme Court in *Southeastern Community College v. Davis*.²⁸ In *Davis*, the Court reviewed a lower court holding that to be "otherwise qualified" for a program, a plaintiff had to be able to satisfy a program's requirements in every respect except for limita-

23. See, e.g., *Strathie v. Department of Transportation*, 716 F.2d 227, 230 (3d Cir. 1983). In *Strathie*, Van Trans, Inc., a private bus company hired and trained the plaintiff, James Strathie, to provide transportation for students in public school districts. *Id.* at 228. Strathie passed the school bus driver license test and began work for Van Trans. See *id.* After discovering that Strathie wore a hearing aid, the Department of Transportation suspended his school bus license because wearing a hearing aid violated a department regulation. See *id.* Except for his hearing aid, Strathie was qualified in every other respect to be licensed to drive a school bus. See *id.* at 229.

In February 1979, Strathie sued, among others, the Department of Transportation. See *Strathie*, 716 F.2d at 229. He alleged that it had violated section 504 of the Rehabilitation Act as well as due process, equal protection, the Civil Rights Act of 1871 and other state laws. See *id.* The complaint sought an injunction that would prevent the Department of Transportation from enforcing its regulations, thereby permitting Strathie to continue to drive a school bus. See *id.* The district court dismissed all of Strathie's claims. See *id.*

On appeal, the Third Circuit examined Strathie's Rehabilitation Act claim. See *id.* The court stated the four factors necessary for a plaintiff to bring a claim under section 504 of the Rehabilitation Act. See *Strathie*, 716 F.2d at 230. In applying the four factors to the case, the Third Circuit concluded that Strathie was a handicapped individual who was suspended solely due to his handicap. See *id.* It was also noted that the school bus driver licensing program receives federal funding. See *id.* In addition, the Third Circuit held that further determination was necessary as to whether accommodating a person who wore a hearing aid would present an unreasonable risk to school bus passengers. See *id.* at 234.

24. 29 U.S.C. § 794(a).

25. 29 U.S.C. § 706(8)(B) (1994).

26. See 34 C.F.R. § 104.3(j)(2)(ii) (1996) (including "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" as major life activities).

27. 29 U.S.C. § 794(a).

28. 442 U.S. 397 (1979).

tions imposed by a handicap.²⁹ The Court determined that this reading of the requirement was inaccurate since it did not consider the extent of a handicap's limitation in determining whether the person was "otherwise qualified."³⁰ Instead, the *Davis* Court held that an "otherwise qualified" person is one who, in spite of the disability, can meet all of a program's requirements.³¹ In effect, the Court stated that if a plaintiff's disability made him or her unable to meet an essential requirement of a program, the program may exclude the plaintiff without violating section 504 of the Rehabilitation Act.³²

Despite this pronouncement, the Court noted that changes in a program may be necessary when refusing to do so would be unreasonable and discriminatory.³³ This duty to effect change in a program applies so long as such modifications are reasonable.³⁴ The *Davis* Court limited "reasonable" alterations to modifications

29. *Id.* at 406. The plaintiff, Frances B. Davis, a student at Southeastern Community College, sought admission into the school's nursing program. *See id.* at 400. During the application and interview process, the program discovered that Davis had a hearing problem. *See id.* Subsequently, the plaintiff took an auditory examination to fully diagnose her hearing. *See id.* at 401.

The examiners determined that the plaintiff had bilateral sensori-neural hearing loss, which required Davis to wear a hearing aid. *See Davis*, 442 U.S. at 401. Further, the examiners concluded that the plaintiff would still have difficulty understanding normal speech and would have to depend on lip reading to effectively communicate. *See id.* As a result of this examination and following a recommendation of the State Board of Nursing, the college rejected Davis's application to the nursing program. *See id.* Davis asked the college to reconsider its decision but the staff voted to deny the application. *See id.* at 402.

The plaintiff filed a discrimination claim under section 504 of the Rehabilitation Act. *See id.* at 402-03. The district court noted that reliance on lip reading would be completely ineffective in situations such as when doctors and nurses have to wear surgical masks. *See Davis*, 442 U.S. at 403. Consequently, the district court ruled that Davis was not otherwise qualified under section 504 of the Rehabilitation Act to gain admission into the nursing program. *See id.* On appeal, the Fourth Circuit reversed the district court's decision and held that the district court should have focused only on academic and technical qualifications and disregarded the effects of Davis's handicap. *See id.* at 404.

30. *See id.* The Court stated that this holding "assumes, in effect, that a person need not meet legitimate physical requirements in order to be 'otherwise qualified.'" *Id.* at 406.

31. *Davis*, 442 U.S. at 406.

32. *See id.* at 406-07.

33. *See Davis*, 442 U.S. at 412-13.

34. *See School Bd. v. Arline*, 480 U.S. 273, 287 & n.17 (1987). In evaluating whether the plaintiff was otherwise qualified for a job, the *Arline* Court decided that it must consider whether a "reasonable accommodation" would enable the person with a disability to perform. *Id.* The Court further noted that employers have an affirmative duty to make reasonable accommodations for handicapped employees. *See id.* at 289 n.19.

that were not substantial adjustments in the program.³⁵ Accordingly, the court implied that failure to substantially alter a program requirement would not constitute a violation of the Rehabilitation Act.³⁶

In *Doherty v. Southern College of Optometry*,³⁷ the Sixth Circuit further clarified the situations in which a program had to reasonably accommodate a handicapped individual.³⁸ In *Doherty*, an optometry student brought a claim under the Rehabilitation Act that the college had discriminated against him as a result of his visual disability, which caused him to fail to meet program requirements.³⁹ The circuit court ruled that the college of optometry did not have to accommodate the plaintiff by waiving a proficiency requirement.⁴⁰ The court held that since proficiency tests were a necessary requirement for graduating with a degree, waiving the tests would be a substantial rather than a reasonable accommodation.⁴¹ By this standard, the Sixth Circuit determined that the Rehabilitation Act does not mandate programs to waive necessary requirements.⁴²

To satisfy the third element of a Rehabilitation Act claim, the plaintiff must produce evidence that he or she has been excluded due solely to his or her disability.⁴³ This requirement, however, takes into account that a plaintiff may need to meet certain physical qualifications in order to qualify for a program.⁴⁴ In *Southeastern*

35. *Davis*, 442 U.S. at 410. The *Davis* Court noted that substantial adjustments were an unauthorized extension of the employer's duties under section 504 of the Rehabilitation Act. *Id.* It also stated that a fundamental alteration in the nature of a program is beyond the modification required by the regulation. *See id.*

36. *See id.*

37. 862 F.2d 570 (6th Cir. 1988).

38. *Id.* at 575.

39. *Id.* at 572-73. The plaintiff had retinitis pigmentosa, which was an associated neurological condition that restricted his visual field. *See id.* at 572. Prior to his admittance at the optometry school, the college had examined him and had determined that he could succeed in the field. *See id.* During the first year at the college, the school required students to pass certain proficiency tests. *See Doherty*, 862 F.2d at 572-73. Due to his disability, the plaintiff was unable to meet these requirements. *See id.* He was also unsuccessful in attempting to have the Admissions Committee waive them. *See id.*

40. *See id.* at 575.

41. *See id.* In the lower court, the district court had stated that the law does not require a program to accommodate a person through a waiver when the "failure to meet that requirement poses potential danger to the public." *Doherty v. Southern College of Optometry*, 659 F. Supp. 662, 673 (W.D. Tenn. 1987).

42. *See Doherty v. Southern College of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988).

43. 29 U.S.C. § 794(a) (1994).

44. *See Southeastern Community College v. Davis*, 442 U.S. 397, 407, 410 (1979) (deeming certain physical qualifications as necessary requirements that handicapped person had to meet in order to qualify for program).

Community College v. Davis, the Supreme Court allowed the college to deny admission to a hearing-impaired individual because hearing was a necessary physical qualification.⁴⁵ Therefore, a program may exclude a plaintiff who cannot meet certain physical requirements, but it may not exclude anyone solely due to a disability, provided the plaintiff can meet that program's necessary requirements.

Finally, the plaintiff must show that the program receives federal financial assistance.⁴⁶ This requirement makes the Rehabilitation Act inapplicable to many programs.⁴⁷ For example, private employers that do not receive federal aid of any sort would not be bound by Rehabilitation Act regulations. In an attempt to regulate these situations, Congress has provided additional legislation to supplement the Rehabilitation Act.⁴⁸

2. *Americans with Disabilities Act*

In 1990, Congress enacted the Americans with Disabilities Act (ADA) to help remedy still-existing discrimination against the disabled.⁴⁹ Among its purposes, the ADA seeks to provide a comprehensive plan to eliminate discrimination against the disabled with the use of clear and consistent standards and guidelines.⁵⁰

45. *Id.* at 407-08. In *Davis*, the Court decided that in a nursing program's clinical phase, the ability to hear and understand speech without depending on lip reading was necessary for patient safety. *Id.* at 407. In such an environment, the court noted that the individual could only function with close supervision. *See id.* at 409. This necessary supervision would constitute a fundamental alteration to the nature of a program. *See id.* at 410.

46. *See* 29 U.S.C. § 794(a). Section 504 of the Rehabilitation Act also allows the plaintiff to show that the program is conducted by any Executive agency or by the United States Postal Service. *See id.*

47. For a discussion of the limited coverage of the Rehabilitation Act in comparison to the ADA, see *infra* notes 51-58 and accompanying text.

48. For a discussion of this additional legislation, see *infra* notes 49-74 and accompanying text.

49. 42 U.S.C. § 12101 (1994). Prior to the enactment of the Act, Congress concluded that despite changes and improvements in society, individuals with disabilities still face certain forms of discrimination. *See id.* § 12101(a)(2). Congress recognized that current laws were insufficient to solve this problem of discrimination. *See* Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907, 937 (1997). Discrimination continued to exist in aspects of life such as employment, public accommodations, public services, recreation and education. *See* 42 U.S.C. § 12101(a)(3). Congress also noted that the nation should strive to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for the disabled. *Id.* § 12101(a)(8).

50. *See* 42 U.S.C. § 12101(b)(1)-(2).

While Congress may have intended the ADA to work in conjunction with the Rehabilitation Act,⁵¹ the ADA clearly has a broader scope, reaches more areas and, for all purposes, supersedes the Rehabilitation Act.⁵² Title II of the ADA protects against discrimination from public entities,⁵³ and Title III extends the coverage to public accommodations and services operated by private entities.⁵⁴

In the employment context, Title I of the ADA establishes that an employer may not "discriminate against a qualified individual

51. *See id.* § 12201(a). "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." *Id.*

52. *See infra* notes 53-58 and accompanying text.

53. 42 U.S.C. § 12132. This section states that:

Subject to the provisions of this subchapter, no qualified individual with a disability shall by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Id.

Title I uses a different interpretation of "public entity" than the Rehabilitation Act. *See id.* § 12131(1). Title II defines the term as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a state or states or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority." *Id.*

54. 42 U.S.C. § 12182(a) (1994). This section states that:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

Id.

An example of the ADA's extensive scope is in the recent district court decision on a summary judgment motion in *Martin v. PGA Tour, Inc.*, No. CIV. 97-6309-TC, 1998 WL 54998, at *1 (D. Or. Jan. 30, 1998). In *Martin*, the United States District Court for the District of Oregon examined whether the PGA Tour was subject to compliance with the ADA. *Id.* at *1. The PGA Tour contended that it was exempt from the ADA due to its operation as a private non-profit association. *See id.* at *3. In the alternative, the PGA Tour argued that even if it was not exempt, it does not constitute a place of public accommodation. *See id.* The district court disagreed and concluded that the PGA Tour was not exempt from the ADA because of its status as a commercial enterprise for the economic benefit of its members. *See id.* at *3. Further, the *Martin* court noted that Title III defined "public accommodation" to specifically include a golf course. *Martin*, 1998 WL 54988 at *6 (citing 42 U.S.C. § 12181(7)(K)). The court disregarded PGA Tour's argument that the fairways and greens of golf courses during its tournaments are not places of public accommodation by rejecting the idea of dual public/private zones. *See id.* at *6-7. Accordingly, the court held that the PGA Tour operates a place of public accommodation on the golf courses at which it conducts its tournaments. *See id.* at *7.

For a discussion of the findings of fact and conclusions of law in *Martin*, see *infra* note 74.

with a disability because of the disability.”⁵⁵ Section 504 of the Rehabilitation Act applies only to actions by programs that receive federal financial assistance.⁵⁶ By contrast, the ADA, in the employment context, prohibits discrimination by employers who retain fifteen or more employees regardless of whether or not they receive federal funding.⁵⁷ Congress intended this additional coverage to help remedy the problems that remained even after the Rehabilitation Act’s enactment.⁵⁸

To prevail under the ADA, a plaintiff must prove: (1) the plaintiff has a disability, (2) the plaintiff was qualified and (3) the plaintiff was denied either a reasonable accommodation for the disability or was subject to an adverse decision made solely because of the disability.⁵⁹ For the most part, the analysis parallels claims that are brought under the Rehabilitation Act.⁶⁰

Under the first element, the plaintiff must prove that he or she has a disability under the ADA.⁶¹ Similar to the Rehabilitation Act, the ADA defines a disability as a “physical or mental impairment that substantially limits one or more of the major life activities of such [an] individual.”⁶² Federal regulations define “major life activities” as those involving the senses or routine daily activities.⁶³ A plaintiff qualifies as having a “disability” under the Act if the impair-

55. 42 U.S.C. § 12112(a). In the employment context, the ADA’s general rule is that:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Id.

56. 29 U.S.C. § 794(a) (1994).

57. 42 U.S.C. § 12111(5)(A). This section states, in pertinent part, “[t]he term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person” *Id.*

58. *See* 42 U.S.C. § 12101 (1994).

59. *See, e.g.,* *Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996) (discussing factors of ADA claim).

60. *See, e.g.,* *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1177 (1996) (stating that analysis of ADA claims roughly coincide with Rehabilitation Act claims).

61. *See* 42 U.S.C. §§ 12132, 12182 (1994) (requiring individual to have disability to qualify for its protection).

62. *Id.* § 12102(2)(A).

63. *See* 29 C.F.R. § 1630.2(i) (1994) (including “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” as major life activities).

ment substantially limits one or more of these major-life activities.⁶⁴ The test used to determine if an impairment "substantially limits" a major life activity takes into account the nature and severity of the impairment, its expected duration and the long-term or expected long-term impact.⁶⁵ Under this definition of a "disability," an impairment that does not substantially hinder or affect daily activities or senses does not constitute a disability under the ADA.⁶⁶

The second part of the ADA analysis requires that the plaintiff be a "qualified individual."⁶⁷ Unlike the Rehabilitation Act, the ADA provides statutory definitions of what constitutes a "qualified individual."⁶⁸ The ADA uses the term to mean a person who, "with or without a reasonable accommodation, can perform the necessary functions of the employment position"⁶⁹ or meets the essential eligibility requirements in the public services context.⁷⁰

64. See 42 U.S.C. § 12102(2)(A).

65. See 29 C.F.R. § 1630.2(j)(2).

66. See *Roush v. Weastec, Inc.*, 96 F.3d 840, 844 (6th Cir. 1996). In *Roush*, the plaintiff brought an ADA claim against her employer, alleging that the employer violated her rights by failing to grant her further excused medical leave. *Id.* at 842. The plaintiff had a kidney condition that required her to take a medical leave in 1991 to undergo a pyeloplasty operation. See *id.* In 1992, the plaintiff underwent further bi-monthly treatments to treat her bladder condition. See *id.* The defendant denied her request for excused leave for these treatments. See *id.* The plaintiff was forced to take unexcused time off and claimed that she was then subject to discipline. See *Roush*, 96 F.3d at 842.

The plaintiff claimed that her kidney and bladder condition constituted a disability under the ADA since it substantially limited her ability to work, which is a major life activity. See *id.* at 843. On a motion for summary judgment, the Sixth Circuit, however, concluded that no evidence existed that the kidney impairment substantially limited a major life activity as defined by the ADA. See *id.* at 844. The *Roush* court determined that "since the kidney condition was temporary, it is not substantially limiting and, therefore, is not a disability." *Id.* With regard to the bladder condition, the court found an existing genuine issue of material fact as to whether the condition limited her working. See *id.*

67. 42 U.S.C. § 12112(a) (1994) (employment context); *id.* § 12132 (public services).

The ADA does not use the term "qualified individual" for places of public accommodation operated by private entities under Title III. See *id.* § 12182(a). Instead, Title III only prohibits discrimination from "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations . . ." *Id.*

68. See *id.* § 12111(8) (employment context); *id.* § 12131(2) (1994) (public services).

69. *Id.* § 12111(8).

70. See *id.* § 12131(2). The section states, in pertinent part, that a qualified individual means "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.*

In analyzing this second factor, courts must determine whether a reasonable accommodation would make the person qualified.⁷¹ If a reasonable accommodation is possible but the employer, program or service does not implement the accommodation, it may be denying the individual solely on the basis of the disability.⁷² The test, which resembles the "reasonable" test used for the Rehabilitation Act, deems a modification unreasonable and an undue hardship upon the program if it fundamentally changes the nature of the program.⁷³ Under the ADA, to avoid having to make an accommodation, an employer, program or service must demonstrate that a modification would result in a fundamental alteration. Consequently, cases involving athletic eligibility requirements often revolve on whether the court deems a waiver to be a fundamental alteration or a reasonable modification.⁷⁴

71. See *id.* § 12111(8) (allowing individual to be qualified with reasonable accommodation in employment context); *id.* § 12131(2) (permitting individual to be qualified with reasonable accommodation in public services context); *id.* § 12182(b)(2)(A)(ii) (prohibiting, for public accommodations owned by private entities, "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such . . . accommodations to individuals with disabilities, unless . . . making such modifications would fundamentally alter the nature of such . . . accommodations being offered").

The implementing regulation for public entities requires those entities to make reasonable modifications when they are necessary to avoid discrimination due to a disability unless "making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (1997).

72. See *supra* note 71.

73. See *supra* note 71.

74. See *infra* notes 136-52 and accompanying text; cf. *Martin v. PGA Tour, Inc.*, No. 97-6309-TC, 1998 WL 67529 at *1 (D. Or. Feb. 19, 1998).

The district court's findings of fact and conclusions of law in *Martin* discussed the application of ADA requirements to a professional sports organization such as the PGA. *Id.* In *Martin*, the plaintiff, who was a disabled golfer, petitioned the PGA Tour for the use of a golf cart during PGA tournaments pursuant to a reasonable modification under the ADA. *Id.* at *1. PGA Tour asserted that the ADA did not apply to its tournaments. See *id.* at *2. Further, PGA Tour argued that even if the ADA did apply, waiving the organization's walking requirement during its events would be a fundamental alteration of a necessary requirement. See *id.* The district court dismissed the first argument and held that the ADA applied to the PGA and its tournaments. See *Martin v. PGA Tour, Inc.*, No. CIV. 97-6309-TC, 1998 WL 54998 (D. Or. Jan. 30, 1998).

The court then examined whether requiring a waiver of the cart rule was a reasonable accommodation or a fundamental alteration that would result in an undue hardship to the PGA. See *Martin*, 1998 WL 67529, at *2. It determined that the use of a cart was a reasonable accommodation. See *id.* at *6. At the senior PGA Tour and the Qualifying School Tournament, two of the four tours that the PGA stages, the PGA permits the use of carts with no penalty. See *id.* This permitted use of a cart worked against PGA Tour's contention that walking was a necessary requirement that injected an important element of fatigue in shot-making. See *id.*

The *Martin* court examined whether the modification would result in a fundamental alteration. *Id.* at *7. It concluded that allowing a cart was not a fundamental alteration. See *Martin*, 1998 WL 67529, at *12. *Martin* can no longer walk a golf

B. Athletic Eligibility Regulations

1. *Age and semester-based athletic eligibility requirements*

High school athletic eligibility rules, promulgated by athletic associations, seek to regulate the qualifications of participants in interscholastic sports.⁷⁵ Athletic associations intend these regulations to negate anti-academic tendencies and practices used by athletic programs who try to gain competitive advantages.⁷⁶

One of the practices targeted by associations is "redshirting."⁷⁷ Redshirting occurs when a school holds a student back academically in order to develop and improve the student's athletic ability.⁷⁸ While the student spends an extra year in school, his or her maximum allowable time to compete in sports is not affected.⁷⁹ The theory behind the practice is that an extra year of competition will increase a student's athletic maturity, enhance his or her performance and allow the team to be more competitive.⁸⁰ To help eliminate this practice, athletic associations have enacted eligibility

course due to his disability. *See id.* at *1. The court did not consider the walking rule's purported purpose of adding fatigue to shot-making to be as significant as other factors such as dehydration. *See id.* at *8. Further, the court pointed out that at least some of the PGA's rules are alterable. *See id.* at *10-12. The PGA accommodates blind golfers by allowing a coach and a modification of the advice rules. *See id.* at *10-11. In the case of a blind golfer, the court noted that the PGA Tour must also conduct an individualized assessment to determine if the golfer qualifies for the rules modifications. *See Martin*, 1998 WL 67529, at *12. The court analogized Martin's situation to that of the current modifications available for blind golfers and concluded that the requested accommodation was reasonable. *See id.*

75. *See CHAMPION*, *supra* note 1, § 16.7 (1990) (explaining purposes of athletic eligibility rules).

Athletic associations are established by states on an individual basis. *See WONG*, *supra* note 4, at 188. All fifty states have high school athletic associations that cover, in varying degrees, a state's interscholastic athletic programs. *See id.* at 185, 187. Generally, high school athletic associations consist of high schools within a state that agree to compete in association events while following rules and regulations. *See id.* at 185. Athletic associations are primarily responsible for promulgating and enforcing the eligibility regulations for student athletes. *See id.* at 240.

76. *See CHAMPION*, *supra* note 1, § 16.7 (1990). Athletic associations enact eligibility rules to promote amateur athletics and protect student athletes. *See WONG*, *supra* note 4, at 240. If students do not meet eligibility standards, athletic associations may penalize the athlete, team and/or school for a team's use of an ineligible athlete. *See id.*

77. *See WONG*, *supra* note 4, at 275. Athletic associations also target other practices such as recruitment of transfer students and drug use, as well as establishing requirements pertaining to grade point average and academic progress. *See id.* at 240.

78. *See CHAMPION*, *supra* note 1, § 16.7 (1990).

79. *See WONG*, *supra* note 4, at 275.

80. *See Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994) (mentioning discouragement of students from delaying education to gain athletic maturity as one reason for age limits).

regulations that discourage the placement of athletics over academics.⁸¹ Commonly, the regulations that limit redshirting are the maximum age rule and the maximum semester rule.⁸² These rules seek to "reduce the competitive advantage flowing to teams using older athletes" and to "protect[] younger athletes from harm" as well as to restore academics as the top priority over athletics.⁸³

The first option for students who are rendered ineligible pursuant to these regulations is to challenge their status by requesting a waiver or hardship exception.⁸⁴ Often, athletic associations permit a waiver of some or all of their regulations if cause is shown.⁸⁵ The second option for students is to file suit in court to obtain an injunction permitting them to play.⁸⁶

81. For common examples of athletic eligibility regulations, see *infra* note 82.

82. See CHAMPION, *supra* note 1, § 16.7 (1990 & Supp. 1996). Maximum age rules usually prohibit the participation in interscholastic sports of anyone who has turned nineteen. See *id.* A few states, such as Maine and North Dakota, extend the limit to age twenty. See APPENZELLER, *supra* note 5, at 143-44. Maximum semester rules declare a student athletically ineligible after eight semesters spent in high school. See CHAMPION, *supra* note 1, § 16.7 (1990 & Supp. 1996).

For examples of cases involving maximum age rules, see Johnson v. Florida High Sch. Activities Ass'n, Inc., 102 F.3d 1172 (11th Cir. 1997); Sandison v. Michigan High Sch. Athletic Ass'n, Inc., 64 F.3d 1026 (6th Cir. 1995); Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926 (8th Cir. 1994); Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996); Reaves v. Mills, 904 F. Supp. 120 (W.D.N.Y. 1995); Booth v. University Interscholastic League, No. Civ. A-90-CA-764, 1990 WL 484414, at *1 (W.D. Tex. Oct. 4, 1990); Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418 (E.D. Pa. 1982); University Interscholastic League v. Buchanan, 848 S.W.2d 298 (Tex. Ct. App. 1993). For an example of a credit hour requirement rule, which requires a minimum number of credit hours in the student's previous semester, see Hoot v. Milan Area Schs., 853 F. Supp. 243 (E.D. Mich. 1994).

83. Pottgen, 40 F.3d at 929; see also WONG, *supra* note 4, at 277-78 (noting that regulations prohibiting redshirting seek to prevent "competition between individuals with vast differences in strength, speed, and experience" and promote player safety).

An additional reason for redshirting regulations is to prevent older athletes from taking the space of other younger athletes on teams with limited squad size. See *id.* at 282.

84. See, e.g., Hoot, 853 F. Supp. at 245. In *Hoot*, the school superintendent requested a waiver of athletic eligibility requirements from the MHSAA for the plaintiff, who had a disability. See *id.* The plaintiff did not meet a minimum credit hour requirement. See *id.* The MHSAA subsequently denied the waiver request. See *id.*

85. See, e.g., MHSAA CONSTITUTION, Art. VII, § 4(E). In the Michigan High School Athletic Association, the Executive Committee "shall have the authority to set aside the effect of any regulation governing eligibility of students" except with regard to age "when in its opinion the rule fails to accomplish the purpose for which it is intended, or when the rule works an undue hardship upon the student or school." *Id.*

86. For a sampling of cases involving the attempts of disabled students to participate in sports by trying to obtain an injunction in court, see *supra* note 5.

Students who obtain an injunction in court must be wary of a possible reversal of the decision. For example, athletic associations may have retroactive punishment rules that would penalize the student or school district for the use of a player later deemed ineligible.⁸⁷ Courts have treated retroactive action by athletic associations with differing results.⁸⁸

In *Cardinal Mooney High School v. Michigan High School Athletic Association*,⁸⁹ a student with a disability sought and obtained a restraining order that allowed him to play on his basketball team despite violating an age eligibility rule.⁹⁰ This order also enjoined the MHSAA from punishing either the student or the school for his participation in sports.⁹¹ While the student played in a number of games, he was not a starting player and did not contribute materially to any victories.⁹² The MHSAA eventually prevailed on the merits, but both the state circuit court and the state court of appeals ruled that the MHSAA could not assess penalties in retro-

In determining whether to issue a preliminary injunction, a district court must consider four factors: "(1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of a preliminary injunction." *Sandison*, 64 F.3d at 1030 (citing *USACO Coal Co. v. Carbomin Energy*, 689 F.2d 94, 98 (6th Cir. 1982)).

If a district court issues a preliminary injunction, a court of appeals will use an abuse of discretion standard of review to determine whether to uphold the injunction. *See In re Eagle-Pitcher Indus., Inc.*, 963 F.2d 855, 858 (6th Cir. 1992). Under this standard, the court of appeals reviews the district court's findings of fact for clear error and its legal conclusions de novo. *See id.* Either a legal or factual error is sufficient to result in an abuse of discretion. *See id.*

87. *See, e.g.*, MHSAA HANDBOOK, Regulation V, § 4(C). This regulation states that if a player is permitted to play due to a court order or injunction and that injunction is subsequently vacated, stayed, reversed or unjustified, then the MHSAA may still take action pursuant to its other regulations. *See id.*

88. *See infra* notes 89-117 and accompanying text.

89. 467 N.W.2d 21 (Mich. 1991).

90. *Id.* at 23. The student, John McClellan, was a senior at Cardinal Mooney High School during the 1987-88 school year. *See id.* McClellan had turned 19 before September 1, 1987, which made him ineligible to participate in interscholastic athletics under MHSAA regulations. *See id.* In the fall of 1987, special education counselors at Cardinal Mooney High School determined that McClellan, who had previously attended a school for the emotionally handicapped, would benefit from playing on the school's varsity basketball team. *See id.* As a result, Cardinal Mooney High School and McClellan's family challenged the age-eligibility rule's application to McClellan. *See id.* at 23. The court issued a temporary restraining order that prevented the MHSAA from enforcing the rule against McClellan and from penalizing Cardinal Mooney High School. *See id.*

91. *See id.*

92. *See id.* During the previous school year, McClellan also participated on the basketball team as a reserve player. *See id.*

spect.⁹³ The Michigan Supreme Court considered the retrospective punishment rule⁹⁴ and upheld its validity.⁹⁵ It based its decision to uphold the rule partly upon the agreement of MHSAA member schools to submit to regulations as a condition to association membership.⁹⁶

The case of *Sandison v. Michigan High School Athletic Association, Inc.*⁹⁷ supported the ability of athletic associations to retroactively punish school districts when the student is later deemed ineligible. In *Sandison*, two students obtained temporary restraining orders and injunctions that permitted their participation in sports despite exceeding the athletic association's age limit.⁹⁸ The injunction also prevented the MHSAA from imposing penalties upon either the students or the school district.⁹⁹ In its review of the district court's decision after the students had graduated from high school, the Sixth Circuit determined that while the case was not "capable of

93. See *id.* at 23. The court of appeals affirmed the circuit court's decision with regard to the punishment of Cardinal Mooney High School. See *id.* It held that allowing punishment would cause the temporary restraining order to be meaningless and would penalize the school for using the judicial system. See *id.* (citing *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 445 N.W.2d 483, 486 (Mich. Ct. App. 1989)).

94. Rule 3(D) of the MHSAA provided:

If a student is ineligible according to MHSAA rules but is permitted to participate in interscholastic competition contrary to such MHSAA rules but in accordance with the terms of a court restraining order or injunction against his/her school and/or the MHSAA and said injunction is subsequently voluntarily vacated, stayed, reversed or finally determined by the courts that injunctive relief is not or was not justified, then any one or more of the following actions shall be taken against such school in the interest of restitution and fairness to the competing schools:

(1) —Require that individual or team records and performances achieved during participation by such ineligible student shall be vacated or stricken.

(2) —Require that team victories shall be forfeited to opponent.

(3) —Require that team or individual awards earned by such ineligible student be returned to the association.

MHSAA HANDBOOK, Regulation V, § 3(D) (cited in *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 467 N.W.2d 21, 22-23 (Mich. 1991)).

In 1991, this rule was codified in MHSAA Handbook, Regulation V as rule 3(D). Currently, the rule exists as rule 4(B) and 4(C). For the text of the current rule, which retains virtually the same text as the former rule, see *infra* note 168.

95. See *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 467 N.W.2d 21, 24 (Mich. 1991).

96. See *id.*

97. 64 F.3d 1026 (6th Cir. 1995). For an in-depth discussion and treatment of *Sandison*, see generally, Jason L. Thomas, Note, *Through the ADA and the Rehabilitation Act, High School Athletes Are Saying "Put Me in Coach"*: *Sandison v. Michigan High Sch. Athletic Ass'n*, 65 U. CIN. L. REV. 727 (1997).

98. *Sandison*, 64 F.3d at 1029. For a factual summary of the background, see *infra* notes 141-43 and accompanying text.

99. See *Sandison*, 64 F.3d at 1029.

repetition," the decision ordering the MHSAA to refrain from punishing the high schools was not moot.¹⁰⁰ The court based this decision on the interest retained by the students in preventing the MHSAA from erasing their teams' records and performances.¹⁰¹ After determining that the plaintiffs were unlikely to succeed on the merits of their claims, the Sixth Circuit reversed the decision enjoining the MHSAA from penalizing the schools for the students' performance.¹⁰²

Despite these holdings, other courts have refused to allow retroactive punishment by athletic associations.¹⁰³ In *Crocker v. Tennessee Secondary School Athletic Association*,¹⁰⁴ the Sixth Circuit prohibited an athletic association from imposing penalties upon a high school.¹⁰⁵ In *Crocker*, a student obtained an injunction to play despite a "transfer" regulation that prohibited students who transferred from one high school from playing certain sports for a year.¹⁰⁶ This injunction also prohibited the athletic association from penalizing the high school for the student's participation.¹⁰⁷

100. *Id.* at 1029-30. The "capable of repetition yet evading review" exception to mootness applies in cases where the case could not be litigated due to the short duration of the challenged action, but where the complaining party has a reasonable expectation of being subjected to the same action in the future. *See id.* at 1030 (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). The *Sandison* court concluded that the case did not fall within this exception since the plaintiffs had already graduated from high school and would not be subjected to the same action in the future. *Id.*

101. *See id.*

102. *See Sandison*, 64 F.3d at 1037. For a discussion of the ADA and Rehabilitation claims of the *Sandison* plaintiffs, see *infra* notes 140-46 and accompanying text.

103. *See Johnson v. Florida High Sch. Activities Ass'n, Inc.*, 102 F.3d 1172 (11th Cir. 1997) (holding no case or controversy existed between student and athletic association after student's graduation); *Jordan v. Indiana High Sch. Athletic Ass'n*, 16 F.3d 785 (7th Cir. 1994) (enjoining athletic association from acting against school's use of potentially ineligible athlete); *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, No. 89-6450, 1990 WL 104036, at *1 (6th Cir. July 25, 1990) (preventing athletic association from penalizing high school which complied with district court order). *But see Sandison*, 64 F.3d at 1037 (reversing lower court decision which prohibited penalizing schools for students' performance); *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 467 N.W.2d 21 (Mich. 1991) (upholding retrospective punishment rule).

104. No. 89-6450, 1990 WL 104036, at *1 (6th Cir. July 25, 1990).

105. *Id.*

106. *Id.* at *2. The plaintiff, Michael Crocker, had transferred during his tenth grade year from Ezell-Harding Christian School to McGavock High School. *See id.* at *1. Tennessee Secondary School Athletic Association (TSSAA) regulations rendered transfer students ineligible to participate in football, basketball, baseball, and track for a period of one year. TSSAA Article II, § 13 (discussed in *Crocker*, 1990 WL 104036, at *1). Crocker wanted to play football at his new high school. *See Crocker*, 1990 WL 104036, at *2.

107. *See Crocker*, 1990 WL 104036 at *2.

While the Sixth Circuit vacated the case as moot, it prohibited punishment of the student's high school since the school was only complying with a district court order.¹⁰⁸

Other courts prevented penalizing school districts by claiming that no issue between the parties remained to be resolved.¹⁰⁹ This argument relies on the "case or controversy" requirement for federal court jurisdiction.¹¹⁰ In *Jordan v. Indiana High School Athletic Association (IHSAA)*,¹¹¹ the Seventh Circuit ruled that the athletic association was unable to take action against a high school's use of a potentially ineligible athlete.¹¹² While the athletic association had a rule allowing the imposition of retroactive penalties,¹¹³ the court ruled that the association could not do so since the high school was no longer a party to the suit.¹¹⁴ The court ruled that no live controversy existed between Jordan and the IHSAA since Jordan had already graduated.¹¹⁵ In *Johnson v. Florida High School Activities Association, Inc.*,¹¹⁶ the Eleventh Circuit agreed with the Seventh Circuit's decision in *Jordan* in ruling that no case or controversy existed between the student and the athletic association after the student graduated.¹¹⁷

108. See *id.* at *4 (stating that "[i]t would be unfair to penalize McGavock High School for actions that it took in compliance with a District Court order during the pendency of that order").

109. See *Johnson v. Florida High Sch. Activities Ass'n, Inc.*, 102 F.3d 1172, 1173 (11th Cir. 1997); *Jordan v. Indiana High Sch. Athletic Ass'n*, 16 F.3d 785, 787-88 (7th Cir. 1994). For a discussion of *Johnson*, see *infra* notes 116-17 and accompanying text. For a discussion of *Jordan*, see *infra* notes 111-15 and accompanying text.

110. Article III of the United States Constitution requires that federal courts possess jurisdiction to hear actual cases or controversies. U.S. CONST. art. III, § 2, cl. 1.

111. 16 F.3d 785 (7th Cir. 1994).

112. *Id.* at 788-89. The plaintiff, Herman Jordan, had challenged a maximum semester regulation that rendered him ineligible after he had transferred from Marshall High School to Snider High School. See *id.* at 786. Jordan sought and obtained a permanent injunction preventing the IHSAA from prohibiting his participation. See *id.* at 786-87.

113. See IHSAA Rule 17-6 (cited in *Jordan*, 16 F.3d at 788). This rule allows the IHSAA "to impose retroactive penalties on student athletes (and their schools) who are declared ineligible by the IHSAA but are permitted to participate in interscholastic competition in accordance with a court restraining order or injunction." *Id.*

114. See *Jordan*, 16 F.3d at 788. Whereas the IHSAA had appealed the district court's decision, Snider High School had not appealed the decision. *Id.* at 787.

115. See *id.* at 787-88.

116. 102 F.3d 1172 (11th Cir. 1997).

117. *Id.* at 1173. In *Johnson*, the plaintiff, Dennis Johnson, exceeded the maximum age limit imposed by the Florida High School Activities Association (FHSAA) and was ineligible to participate in football and wrestling. *Id.* Johnson sought and obtained an injunction against enforcement of the age rule and a regulation that

2. *Application of regulations to disabled student-athletes*

In recent years, several student athletes who claim to have disabilities have asserted Rehabilitation Act and ADA rights in order to participate in sports.¹¹⁸ These claims frequently involved a student with a disability exceeding the maximum age regulation but contending that his or her rights under the Rehabilitation Act or ADA are relevant.¹¹⁹ As with all Rehabilitation Act or ADA claims, a student must demonstrate that he or she is otherwise qualified and that a waiver is a reasonable modification.¹²⁰ Courts have split as to whether or not the Rehabilitation Act and ADA apply and allow a waiver.¹²¹

In *Hoot v. Milan Area Schools*,¹²² the district court for the Eastern District of Michigan addressed the "otherwise qualified" requirement of a Rehabilitation Act and ADA claim in denying an athletic association's motion for summary judgment.¹²³ The plaintiff sought an injunction to allow him to participate in athletics despite failing to meet a minimum credit hour enrollment requirement.¹²⁴ The plaintiff was a poor student with behavioral problems and was later diagnosed with Attention Deficit Hyperactivity Disorder (ADHD).¹²⁵ In considering the association's motion for summary judgment, the district court discussed the "otherwise

could penalize the school for allowing his participation. *See id.* Johnson played football and subsequently graduated from high school. *See id.* The FHSAA contended that the case was not moot since it could still enforce penalties against Boca Ciega High School, Johnson's high school. *See Johnson*, 102 F.3d at 1173. Boca Ciega High School, however, was never a party to the case or appeal. *See id.*

118. *See supra* note 5.

119. *See id.*

120. *See supra* notes 27-42 & 67-73 and accompanying text.

121. *See infra* notes 122-52 and accompanying text.

122. 853 F. Supp. 243 (E.D. Mich. 1994).

123. *Id.* at 249-50.

124. *See id.* at 245. The plaintiff, Raymond Hoot, had been denied participation in football by the school superintendent for failure to meet MHSAA Handbook Regulation I, § 7(a)'s requirement of enrollment in twenty credit hours of work for the last semester. *See id.*

125. *See id.* at 244-45. Throughout high school, Hoot had continuous behavior problems in the classroom. *See Hoot*, 853 F. Supp. at 245. During his third year, Hoot's disruptive behavior led to his suspension from school for 21 days. *See id.* Hoot's grade point average at the end of his third year was 0.981 out of a possible 4.0, while earning only 9.5 out of a possible 19 scholastic credits. *See id.* Despite his academic performance, previous psychological and special education testing in his first three years of school revealed no learning disability and actually concluded that Hoot had the ability to succeed academically. *See id.*

In the summer of 1993, before Hoot's fourth year, the school principal declared Hoot ineligible for athletic competition. *See id.* In the same summer, he was also diagnosed with ADHD. *See Hoot*, 853 F. Supp. at 245.

qualified" requirement.¹²⁶ In applying the test of whether a plaintiff is able to meet all of a program's necessary requirements in spite of the handicap, the court refused to conclude that a jury would certainly find that the plaintiff was not "otherwise qualified."¹²⁷ The court relied on the plaintiff's assertion that he was "otherwise qualified" since he was a capable athlete who would be qualified to play if not for his disability.¹²⁸

While *Hoot* did not fully decide whether or not a disabled student-athlete was "otherwise qualified," the Eighth Circuit in *Pottgen v. Missouri State High School Activities Association*¹²⁹ determined that a disabled student who exceeded a maximum age limit was not a "qualified individual."¹³⁰ In *Pottgen*, a student, who had to repeat two grades in elementary school due to an undiagnosed learning disability, challenged the athletic association regulation that rendered him ineligible before his senior season due to his age.¹³¹ The Sixth Circuit considered the district court's grant of an injunction and determined that Pottgen was not an "otherwise qualified" individual.¹³² In its Rehabilitation Act analysis, the court required a plaintiff to meet a program's necessary or essential requirements.¹³³ The court considered an age limit to be an "essential" requirement and noted that the plaintiff would never be able to meet it.¹³⁴ With regard to the ADA claim, the court again considered the age limit to be an essential requirement and that Pottgen could not meet the requirement without modification.¹³⁵

A student may also meet the "otherwise qualified" requirement if he or she can do so after a reasonable modification.¹³⁶ A reasonable modification does not require a program or institution to

126. *See id.* at 249-50.

127. *See id.* at 250.

128. *See id.*

129. 40 F.3d 926 (8th Cir. 1994).

130. *Id.* at 929-31.

131. *See id.* at 927-28. The plaintiff, Edward Pottgen, had turned 19 before his senior year. The state activities association prohibited students who had reached 19 before July 1 from participating in sports for the following school year(s). *See id.* at 928.

132. *See id.* at 929-31.

133. *See Pottgen*, 40 F.3d at 929 (citing *Simon v. St. Louis County*, 656 F.2d 316, 321 (8th Cir. 1981)).

134. *See Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929-30 (8th Cir. 1994). The court stated that waving an essential standard would be a fundamental alteration of the program. *See id.* at 930.

135. *See id.* at 931.

136. *See id.* at 929.

make substantial alterations.¹³⁷ The *Pottgen* court discussed whether or not an age limit waiver was a reasonable accommodation and determined that it constituted a fundamental alteration in the sports program.¹³⁸ Consequently, the student was not “otherwise qualified.”¹³⁹

The result in *Pottgen* was echoed in the Sixth Circuit’s holding in *Sandison v. Michigan High School Athletic Association, Inc.*¹⁴⁰ In *Sandison*, two students suffered from learning disabilities and had each fallen behind the regular grade for students their age in school.¹⁴¹ By their senior year, both students had exceeded the athletic association’s maximum age rule.¹⁴² After the district court granted an injunction, the Sixth Circuit reviewed the finding that the plaintiffs were “otherwise qualified” (under the Rehabilitation Act analysis) or “qualified individuals” (under the ADA analysis).¹⁴³ The court followed *Pottgen* and held that since the age regulation is a necessary requirement, waiver of the regulation was not reasonable.¹⁴⁴ Further, the court determined that the plaintiffs were not excluded solely due to their disability, but were excluded solely be-

137. See *id.* at 930 (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979)). For a discussion of *Davis*, see *supra* notes 28-36 & 44-45 and accompanying text.

138. See *Pottgen*, 40 F.3d at 930.

139. See *id.* at 930-31.

140. 64 F.3d 1026 (6th Cir. 1995).

141. *Id.* at 1028. The plaintiffs, Ronald Sandison and Craig Stanley, suffered from learning disabilities that caused them to fall two years behind the typical school grade for students their age. See *id.* Sandison had trouble processing speech and language while Stanley had difficulty in mathematics. See *id.* Both also ran on their respective high school’s cross-country and track teams during their first three years of high school. See *id.*

142. See *Sandison*, 64 F.3d at 1028. The maximum age rule provided that, “[a] student who competes in any interscholastic athletic contests must be under nineteen (19) years of age, except that a student whose nineteenth (19th) birthday occurs on or after September 1 of a current school year is eligible for the balance of that school year.” MHSAA HANDBOOK, Regulation I, § 2 (reprinted in *Sandison*, 64 F.3d at 1029). Sandison’s high school, Rochester Adams, and Stanley’s high school, Grosse Pointe North, are both MHSAA members that have agreed to adopt and abide by MHSAA rules. See *Sandison*, 64 F.3d at 1028-29.

143. *Sandison*, 64 F.3d at 1034-37. The plaintiffs had filed suit under the Rehabilitation Act and ADA, as well as under the U.S. Constitution, 42 U.S.C. § 1983, and the Michigan Handicappers’ Civil Rights Act. See *id.* at 1029. The district court granted a temporary restraining order that allowed them to run in upcoming races. See *id.* The plaintiffs moved for a preliminary injunction, which was also granted by the district court. See *id.* (citing *Sandison v. Michigan High Sch. Athletic Ass’n, Inc.*, 863 F. Supp. 483 (E.D. Mich. 1994)).

144. See *id.* at 1034. The Sixth Circuit upheld the district court’s finding that the age rule was a necessary requirement. See *Sandison*, 64 F.3d at 1035. The court of appeals, however, ruled that the district court erred in finding that a waiver of the age rule was a reasonable accommodation. See *id.*

cause of their age.¹⁴⁵ Accordingly, the court concluded that the plaintiffs were unlikely to succeed on the merits of their Rehabilitation Act and ADA claims.¹⁴⁶

The district court in *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.* (CIAC),¹⁴⁷ maintained the opposite position, holding that handicapped students are “otherwise qualified” after a “reasonable accommodation.”¹⁴⁸ In *Dennin*, a student who had Down Syndrome had exceeded the maximum age regulation due to special education needs.¹⁴⁹ In considering whether he was “otherwise qualified,” the court analyzed if a “reasonable accommodation” would enable him to be “otherwise qualified.”¹⁵⁰ The court concluded that a waiver of the rule for the plaintiff would not undermine the purposes of the CIAC rule since the plaintiff had no

145. See *Sandison v. Michigan High Sch. Athletic Ass’n, Inc.*, 64 F.3d 1026, 1033 (6th Cir. 1995). In analyzing the plaintiffs’ Rehabilitation Act claim, the court considered whether Regulation I, § 2 excluded the plaintiffs solely by reason of their disability. See *id.* at 1031. The court characterized the regulation as a neutral rule with respect to disability since the MHSAA neutrally applied the rule to all students. See *id.* at 1032.

The court also disregarded the argument that the requirement violated a Department of Education regulation implementing section 504 of the Rehabilitation Act. See *id.* at 1033-34. The Department regulation requires recipients of Department funds that offer interscholastic athletics to “provide to qualified handicapped students an equal opportunity for participation in these activities.” 34 C.F.R. § 104.37(c)(1) (1997). The court ruled that the MHSAA did provide an equal opportunity to participate in athletics and that the age restriction applied equally to students with or without a disability. See *Sandison*, 64 F.3d at 1033-34.

146. See *Sandison*, 64 F.3d at 1037.

147. 913 F. Supp. 663 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996). The Second Circuit subsequently dismissed CIAC’s appeal as moot and vacated the district court’s judgment for the purposes of dismissing the action. *Dennin*, 94 F.3d at 102. For an in-depth treatment of *Dennin*, see Patricia A. Solfaro, Note, *Civil Rights - Courts Should Use an Individualized Analysis When Determining Whether to Grant a Waiver of an Athletic Conference Age Eligibility Rule: Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663 (2d Cir. 1996), 7 SETON HALL J. SPORT L. 185 (1997).

148. *Dennin*, 913 F. Supp. at 668-69.

149. *Id.* at 666. The plaintiff, Joseph Dennin, had spent four years in middle school and began school at Trumbull High School at the age of sixteen. See *id.* Dennin was a member of the swim team for his three previous years in high school prior to his senior year. See *id.* Dennin’s times were generally slow although his relay teams sometimes scored points. See *id.*

CIAC eligibility rules prohibited athletes who had turned 19 on or before September 1 from competing in interscholastic sports. See *Dennin*, 913 F. Supp. at 666. Although his request for a waiver was denied by CIAC, he was allowed to swim as a non-scoring swimmer. See *id.* This decision permitted Dennin to swim in all meets but prevented him and his relay teams from earning points for Trumbull High School. See *id.*

150. See *id.* at 668.

competitive advantage.¹⁵¹ The district court then held that a reasonable accommodation could be provided to him.¹⁵²

As these past cases show, courts are split on the applicability of the Rehabilitation Act and the ADA to certain athletic eligibility rules.¹⁵³ In considering a claim under the two acts, courts have addressed the appropriateness of an injunction, the relative mootness of an appealed injunction, the question of whether students with disabilities were "otherwise qualified" to play and the potential for reasonable modifications that could allow a student to be "otherwise qualified."¹⁵⁴ The judicial split prevents a clear answer as to whether the Rehabilitation Act and ADA provide students with disabilities a basis for receiving a waiver of certain athletic eligibility regulations.

III. FACTS OF *McPHERSON V. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION*

During the 1993-94 school year, Dion McPherson joined the varsity basketball team for the first time at Huron High School.¹⁵⁵ While McPherson was only a junior, the 1993-94 school year represented his seventh and eighth semesters in high school because he repeated the eleventh grade due to poor academic performance.¹⁵⁶ Previously, McPherson had been unable to participate in sports due to his failure to meet the minimum grade point average requirement of the Ann Arbor school district.¹⁵⁷

At the beginning of his senior year in 1994, McPherson was diagnosed with ADHD and a seizure disorder.¹⁵⁸ He wanted to

151. *See id.* at 669. As with other eligibility rules, the purposes of CIAC's age rule included deterring redshirting, protecting younger athletes and discouraging students from delaying their education for athletics. *See Dennin*, 913 F. Supp. at 666. The court noted that Dennin was always the slowest swimmer, his education had not been delayed and he was not a safety risk to anyone. *See id.* at 669.

152. *See id.* (noting that waiver would not be unduly burdensome administratively on CIAC).

153. *See supra* notes 122-52 and accompanying text.

154. *See supra* notes 122-52 and accompanying text.

155. *See McPherson*, 119 F.3d at 456.

156. *See id.*

157. *See id.* Huron High School is in the Ann Arbor school district. *See id.* at 455. This minimum grade point average requirement was imposed by the Ann Arbor school district independent of any MHSAA regulations or requirements. *See id.* at 456. During the 1993-94 school year, McPherson's grades improved enough to meet the school district's minimum grade point average requirement, and he became eligible to participate in sports. *See McPherson*, 119 F.3d at 456.

158. *See id.* McPherson was classified as having a "specific learning disability." *Id.* Prior to this school year, he had never been referred for special education testing by the school. *See id.*

compete in varsity basketball during the 1994-95 school year but he had lost his eligibility under the Michigan High School Athletic Association (MHSAA) maximum semester rule.¹⁵⁹ Since the 1994-95 school year represented his ninth and tenth high school semesters, McPherson was ineligible to participate in interscholastic sports.¹⁶⁰

McPherson filed a request with the MHSAA for a waiver from the maximum semester rule.¹⁶¹ The MHSAA Constitution permits such waivers of the maximum semester rule in certain limited circumstances.¹⁶² After extensive consideration of his situation, the MHSAA rejected McPherson's waiver request.¹⁶³ In rejecting the request, the MHSAA emphasized several factors. It noted that the ADHD medical condition had never required a restriction of Mc-

159. *See id.* The MHSAA regulation states that "[a] student shall not compete in any branch of athletics who has been enrolled in grades nine to twelve, inclusive, for more than eight semesters." MHSAA HANDBOOK, Regulation I, § 4.

Some of the purposes of the eight semester rule include limiting athletic experience to balance the playing field for competitors, deterring of redshirting and preserving academics as the primary function of schooling. *See McPherson*, 119 F.3d at 456. MHSAA's assistant director testified that, in the absence of the rule, redshirting abuses would be common. *See id.*

Huron High School is a member of the MHSAA. *See id.* at 455. An MHSAA member school must ensure that its athletes meet eligibility requirements in order to participate in MHSAA events. *See McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 77 F.3d 883, 885 (6th Cir. 1996), *rev'd en banc*, 119 F.3d 453 (6th Cir. 1997). Further, the Ann Arbor school district has adopted and agreed to abide by MHSAA regulations. *See McPherson*, 119 F.3d at 455.

160. *See McPherson*, 119 F.3d at 456.

161. *See id.*

162. MHSAA CONST., art. VII, § 4(E). The MHSAA Constitution states, in pertinent part:

Except for the eligibility rule in regard to age, the Executive Committee shall have the authority to set aside the effect of any regulation governing eligibility of students or the competition between schools when in its opinion the rule fails to accomplish the purpose for which it is intended, or when the rule works an undue hardship upon the student or school.

Id.

163. *See McPherson*, 119 F.3d at 456-57. Initially, the Executive Committee was reluctant to grant a waiver due to a lack of information on McPherson's physical stature, athletic experience or ability. *See id.* at 456. The Executive Committee expressed reservations about exceeding the maximum limits that were applied to other students. *See id.* It also believed that granting the waiver could provide the Ann Arbor Public Schools with an advantage that resulted from its failure to refer McPherson for special education services in earlier years. *See id.* at 456. The MHSAA then requested further information from the school district to aid it in consideration of the request. *See id.* at 457.

The MHSAA received information from Huron High School's athletic director about McPherson's stature and ability. *See McPherson*, 119 F.3d at 457. The athletic director of Huron High School, Jane Bennett, noted that McPherson "was less than average height and lower than average weight compared to not only members of [the Huron] team but a good sample of [Huron] opponents" and that he was "somewhere in the middle of the pack" in terms of ability. *Id.* The MHSAA considered the information but rejected the request. *See id.*

Pherson's course load.¹⁶⁴ The MHSAA also stressed the school district's refusal to waive its own higher academic eligibility standards.¹⁶⁵ In addition, the MHSAA concluded that his participation in games would affect both teammates and opponents.¹⁶⁶ Finally, the MHSAA believed that the decision would set an unfavorable precedent.¹⁶⁷ Subsequently, McPherson filed a complaint in the Eastern District of Michigan to enjoin the MHSAA from prohibiting his participation in sports for Huron High School and from penalizing the school district for his participation.¹⁶⁸ McPherson argued that the MHSAA violated his rights under the ADA and Rehabilitation Act.¹⁶⁹

In January 1995, the United States District Court for the Eastern District of Michigan concluded that McPherson was likely to succeed on his ADA and Rehabilitation Act claims.¹⁷⁰ The court

164. *See id.*

165. *See id.* The Executive Committee believed that "[i]t [was] inappropriate for the school district to request the athletic association to waive an eligibility requirement for a fifth year senior when the school district had not waived its own higher eligibility requirements" *McPherson*, 119 F.3d at 457.

166. *See id.* The MHSAA noted that McPherson's participation would have a detrimental effect on his high school team since it would reduce the playing time of teammates who met and abided by eligibility regulations. *See id.* The MHSAA also felt that McPherson's participation could adversely affect his opponents who had met and abided by eligibility requirements due to his possible effect on the outcome of contests. *See id.*

167. *See id.*

168. *See McPherson*, 119 F.3d at 457-58. MHSAA Regulation V states, in pertinent part:

SECTION 4(B) - Accidental, intentional or other use of ineligible players by a junior high/middle school or senior high school shall require that team victories are forfeited to opponents; and any one or more of these additional actions may be taken: (1) that individual or team records and performances achieved during participation by such ineligible be vacated or stricken; and (2) that team or individual awards earned by such ineligible be returned to the MHSAA.

SECTION 4(C) - If a student is ineligible according to MHSAA rules but is permitted to participate in interscholastic competition contrary to such MHSAA rules but in accordance with the terms of a court restraining order or injunction against his/her school and/or the MHSAA, and that injunction is subsequently voluntarily vacated, stayed, reversed or finally determined by the courts that injunctive relief is not or was not justified or expires without further judicial determination, those actions in SECTION 4(B) shall be taken.

MHSAA HANDBOOK, Regulation V, §§ 4(B)-(C).

169. *See McPherson*, 119 F.3d at 457-58. McPherson alleged violations of the ADA, the Rehabilitation Act and the Michigan Handicappers' Civil Rights Act, MICH. COMP. LAWS ANN. §§ 37.1101-1160 (West 1985). *See McPherson*, 119 F.3d at 457. For a general discussion of the ADA, see *supra* notes 49-74 and accompanying text. For a general discussion of the Rehabilitation Act, see *supra* notes 17-48 and accompanying text.

170. *See McPherson*, 119 F.3d at 458.

issued a preliminary injunction allowing McPherson to play basketball during the 1994-95 school year.¹⁷¹ The injunction also prohibited the MHSAA from penalizing the school district for allowing McPherson's participation in sports.¹⁷² On appeal by the MHSAA after the season, the United States Court of Appeals for the Sixth Circuit initially dismissed the case as moot.¹⁷³ Upon a rehearing *en banc*, the Sixth Circuit decided that the case was not moot and vacated the injunction.¹⁷⁴ The appellate court held that the ADA did not compel the MHSAA to grant McPherson a waiver.¹⁷⁵ Further, the Sixth Circuit determined that the Rehabilitation Act also did not apply, because the Act has parallel requirements to the ADA.¹⁷⁶

171. *See id.* McPherson played for the basketball team in the 1994-95 season, but he did not prove to be much of an impact player for his team. *See* McPherson v. Michigan High School Athletic Association, 77 F.3d 883, 886 (6th Cir. 1996), *rev'd en banc*, 119 F.3d 453 (6th Cir. 1997). During the 1994-95 season, the Huron High School basketball team compiled a 3-18 record, including 0-6 in its league. *See id.*

172. *See* McPherson, 119 F.3d at 458.

173. *See* McPherson, 77 F.3d at 887. Circuit Judge Oakes, for the majority, first considered whether the appeal met the case or controversy requirement with respect to the injunction allowing his participation. *See id.* at 886. The court noted that McPherson had graduated from high school and concluded that he no longer had an interest in the challenged rule. *See id.* The court held that McPherson's graduation from high school eliminated the controversy requirement with respect to the injunction permitting his participation in athletics. *See id.*

Circuit Judge Oakes then considered the part of the injunction pertaining to possible punishment of McPherson's high school for allowing his participation in sports during the injunction. *See id.* The court noted but dismissed MHSAA's argument that Sandison v. Michigan High School Athletic Association, Inc. had decided the issue. *See* McPherson, 77 F.3d at 887. *See also supra* notes 140-46 and accompanying text. Accordingly, the court held that the MHSAA could not penalize the school district since the school was only following the district court's preliminary injunction. *See* McPherson, 77 F.3d at 887. In support of its position, the court reasoned that had the school not followed the injunction, it would have been acting in contempt of a judicial proceeding. *See id.*

174. *See* McPherson, 119 F.3d at 458, 464. A majority of the judges in the Sixth Circuit voted for a rehearing of the case *en banc*. *See* McPherson v. Michigan High Sch. Athletic Ass'n, 90 F.3d 129, 129 (6th Cir.), *vacating* 773 F.3d 883 (6th Cir. 1996). By granting a rehearing *en banc*, the Sixth Circuit vacated its prior judgment and restored the case to the docket. *See id.*

175. *See* McPherson, 119 F.3d at 462-63.

176. *See id.* at 463. The Rehabilitation Act requires the additional qualification of federal funding. 29 U.S.C. § 794(a) (1994). For an in-depth comparison of the two acts, see generally, Weber, *supra* note 19.

IV. ANALYSIS

A. Narrative Analysis

1. *Majority Opinion*

Circuit Judge Ryan, writing for the majority in *McPherson*, considered the applicability of the Rehabilitation Act and ADA to the MHSAA's maximum semester rule.¹⁷⁷ First, the majority examined whether the case was possibly moot.¹⁷⁸ Next, the court analyzed the issuance of the preliminary injunction beginning with McPherson's ADA claim.¹⁷⁹ Finally, Judge Ryan briefly discussed the plaintiff's rights under the Rehabilitation Act.¹⁸⁰

The majority began its inquiry by discussing whether the case was moot.¹⁸¹ As in *Sandison v. Michigan High School Athletic Association, Inc.*, the majority noted that the controversy regarding whether McPherson should be allowed to compete, which was originally addressed in the preliminary injunction, no longer existed since the season was over.¹⁸² Further, the court followed *Sandison* in dismissing the "capable of repetition yet evading review" exception since the complaining party had graduated from high school and would not be subject to the same action.¹⁸³

Despite these factors, the majority concluded that the case was not moot since both parties retained an interest.¹⁸⁴ The court

177. *McPherson*, 119 F.3d at 458-63.

178. *See id.* at 458-59.

179. *See id.* at 459-63.

180. *See id.* at 463.

181. *See id.* at 458. Neither party had specifically addressed the issue in their briefs. *See McPherson*, 119 F.3d at 458. The court, however, recognized that it did not have jurisdiction over the case unless an actual case or controversy existed. *See id.* (citing *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1318 (7th Cir. 1992)).

In *Crane v. Indiana High School Athletic Association (IHSA)*, the Seventh Circuit heard a similar case involving a student who had been declared ineligible from varsity sports for one year. 975 F.2d 1315, 1317-18 (7th Cir. 1992). By the time the case reached the appellate level, the year had ended, and the injunction had expired. *See id.* at 1318. In discussing whether the case was moot, the court recognized that its jurisdiction, under the U.S. Constitution, extended only to "actual cases and controversies." *Id.* (citing U.S. CONST. art. III, § 2). The Seventh Circuit concluded that the case was not moot because a justiciable controversy remained concerning the interest of the IHSA in imposing retroactive penalties on student athletes and their schools. *See id.*

182. *See McPherson*, 119 F.3d at 458; *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1029 (6th Cir. 1995).

183. *See McPherson*, 119 F.3d at 458; *Sandison*, 64 F.3d at 1029-30 (rejecting "capable of repetition yet evading review" exception, since same complaining party would not be subject to same action again).

184. *See McPherson*, 119 F.3d at 458.

found that McPherson's remaining interest stemmed from his request in the complaint that the MHSAA refrain from taking any action penalizing the school district for his participation.¹⁸⁵ On the other side, the MHSAA specifically requested the Sixth Circuit to reverse the district court's injunction, thereby permitting the MHSAA to strike the records of McPherson and his team.¹⁸⁶ Using the reasoning in *Sandison* and *Pottgen v. Missouri State High School Activities Association*, the court concluded that both parties maintained a legal interest in the MHSAA's request for a reversal of the injunction.¹⁸⁷

After determining that the case was not moot, the majority examined the issuance of the injunction.¹⁸⁸ The majority began its review of the injunction by examining McPherson's ADA claim. Judge Ryan noted that ADA claims roughly parallel Rehabilitation Act claims with the exception of the requirement of federal funding under the Rehabilitation Act.¹⁸⁹ Under the ADA claim, the majority offered two avenues for the plaintiff to follow in order to demonstrate discrimination: (1) offering evidence that learning disabilities were actually considered and discriminated against by the MHSAA in formulating its maximum semester rule or (2) showing that MHSAA could have, but did not, reasonably accommodate McPherson's disability.¹⁹⁰

The court disregarded the first avenue since the plaintiff did not even suggest, nor present evidence, that the MHSAA implemented its maximum semester rule with the motivation of barring disabled students from participation in sports.¹⁹¹ After dismissing

185. *See id.*

186. *See id.* at 458-59.

187. *See id.* at 459; *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1030 (6th Cir. 1995) (finding that plaintiffs "still have an interest in preventing the MHSAA from erasing their teams' victories and their own performances"); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 928 (8th Cir. 1994) (holding live controversy existed for part of injunction prohibiting athletic association from penalizing high school).

188. *See McPherson*, 119 F.3d at 459. In considering the preliminary injunction, the court used the abuse of discretion standard that it had used in *Sandison*. *See id.* (citing *Sandison*, 64 F.3d at 1030).

189. *See id.* at 459-60. The court stated that "[i]t is well-established that the two statutes are quite similar in purpose and scope." *Id.* at 459. The court also emphasized that ADA standards apply in analyzing Rehabilitation Act cases. *See id.* at 460 (citing *Burns v. City of Columbus*, 91 F.3d 836, 842 (6th Cir. 1996)).

190. *See McPherson*, 119 F.3d at 460.

191. *See id.* The court used its reasoning in *Sandison* to conclude that the regulation is neutral with respect to disability. *See id.* (citing *Sandison*, 64 F.3d at 1032). In *Sandison*, the court had concluded that the passage of time, not the disability, was responsible for the students not being able to meet the age requirement. *Sandison*, 64 F.3d at 1033.

the first theory, the court focused on whether the MHSAA could have reasonably accommodated McPherson.¹⁹² The majority found that the only possible accommodation for McPherson would be a complete waiver of the regulation.¹⁹³ In focusing on a waiver as the only possible accommodation, the court examined whether this was a reasonable modification.¹⁹⁴ First, the court considered its prior ruling in *Sandison* that a maximum age eligibility regulation was a necessary requirement.¹⁹⁵ McPherson argued that a fundamental difference existed between the maximum age rule in *Sandison* and the maximum semester rule in the present case because waivers on semester limits are permissible, while age limit waivers are prohibited.¹⁹⁶ The plaintiff reasoned that because the rule could not be considered necessary, the MHSAA would have no burden in waiving the requirement as a reasonable accommodation.¹⁹⁷ In arguing that the requirement was necessary, the MHSAA provided evidence of potential redshirt abuses that could arise without the rule.¹⁹⁸ Further, the MHSAA noted that one of the rule's purposes was to ensure that academics took precedence over athletics in school.¹⁹⁹

Regardless of the availability of a waiver, the majority found no meaningful distinction between the purpose of the age limit rule and that of the maximum semester rule that would make the former necessary but not the latter.²⁰⁰ Since it determined that the semester rule was a necessary requirement, the majority next examined whether or not waiver of the rule would be a fundamental alteration or a reasonable accommodation.²⁰¹ In asking for a waiver based on an individual case assessment, the plaintiff's position was that McPherson was of less than average height, weight and

192. See *McPherson*, 119 F.3d at 461.

193. See *id.* The court depended on its analysis in *Sandison* for its determination that a complete waiver was the only possible accommodation. See *id.* (citing *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1034 (6th Cir. 1995)).

194. See *id.* at 461.

195. See *id.* (citing *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1034 (6th Cir. 1995)).

196. See *McPherson*, 119 F.3d at 461. The MHSAA Constitution allows a waiver for any eligibility rule except for age. MHSAA CONST., art. VII, § 4(E). For the text of the complete provision, see *supra* note 162.

197. See *McPherson*, 119 F.3d at 461. In the past, the MHSAA has granted waivers of the maximum semester rule. See *id.*

198. See *id.* at 462.

199. See *id.* The MHSAA argued that the rule was "essential to preserving the philosophy that students attend school primarily for the classroom education and only secondarily to participate in interscholastic athletics." *Id.*

200. See *McPherson*, 119 F.3d at 461.

201. See *id.* at 461-62.

skill in comparison to teammates and competitors.²⁰² Further, the plaintiff also noted that since the MHSAA had granted waivers in the past, requiring a waiver in this case was reasonable.²⁰³ The MHSAA argued that if a waiver was required under the circumstances, the court would be imposing a substantial financial burden on the association.²⁰⁴ The court used its reasoning in *Doherty v. Southern College of Optometry* to conclude that such an accommodation would be a fundamental alteration in the sports program and would go beyond a reasonable modification.²⁰⁵

The court further supported its position of not granting a waiver under these circumstances. It noted that McPherson did not play sports earlier due to Ann Arbor school district's higher academic eligibility standards.²⁰⁶ The Sixth Circuit also emphasized that McPherson's learning disability was not diagnosed until after his semester eligibility expired.²⁰⁷ The court was sympathetic to MHSAA's concern that to allow a waiver here would create an undesirable precedent in which a school district could control a player's eligibility while the athletic association could not.²⁰⁸

202. See *McPherson*, 119 F.3d at 462. Huron High School's athletic director, Jane Bennett, had supplied information to the MHSAA about McPherson's physical characteristics. See *id.* at 457. Bennett described McPherson as "less than average height and lower than average weight compared to not only members of [the Huron] team but a good sample of [Huron] opponents." *Id.* With regard to teammates and competitors, Bennett did not believe that McPherson posed a safety risk or that he was the "best player on the team." *Id.*

203. See *id.* at 463.

204. See *McPherson*, 119 F.3d at 462. The court noted that the MHSAA would have an immense burden to make "near-impossible determinations" about the relative physical and athletic maturity of any student desiring a waiver. *Id.* The majority recognized that it would be extremely difficult for the MHSAA to differentiate between legitimate requests for waivers and those seeking to gain an unfair advantage. See *id.* at 463. The court was concerned that an increase in the number of students seeking waivers would be extremely troublesome and financially burdensome for the MHSAA. See *id.* at 462. Further, the court reasoned that if an increased number of students gained unfair advantages through waivers, then these students could detrimentally affect interscholastic athletics. See *id.* at 463.

205. See *McPherson*, 119 F.3d at 461 (citing *Doherty v. Southern College of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988)) (noting that waiver of necessary requirement was substantial rather than reasonable accommodation).

206. See *id.* at 463. The court emphasized that the Ann Arbor school district had previously forbidden McPherson from playing in interscholastic sports for his first six semesters in high school due to failure to meet a higher academic standard than that required by the MHSAA. See *id.*

207. See *McPherson*, 119 F.3d at 463. The school district had never referred McPherson for examination of a possible learning disability until fall 1994, after his semester eligibility expired. Compare *id.* (no previous testing) with *Hoot v. Milan Area Schs.*, 853 F. Supp. 243, 245 (E.D. Mich. 1994) (multiple psychological and special education tests throughout student's schooling).

208. See *McPherson*, 119 F.3d at 463. The court concluded that such precedent would encourage school districts and coaches to engage in redshirting. See *id.*

The majority concluded that the plaintiff did not make a successful claim under the ADA.²⁰⁹ Further, since a Rehabilitation Act claim requires the same elements as an ADA claim with the additional requirement of federal financial assistance, the court held that the plaintiff's Rehabilitation Act claim also failed.²¹⁰ As a result, the court vacated the preliminary injunction and reversed the decision.²¹¹

2. *Dissenting Opinions*

Circuit Judge Merritt, writing a dissenting opinion, focused on his concern that the majority opinion did not deal with the issue of whether the MHSAA could now punish the school district.²¹² Judge Merritt would have the court oppose any retaliation by an athletic association against school districts that were merely acting in compliance with a district court injunction.²¹³ Judge Merritt found unpersuasive the contrary view espoused by the state supreme court in *Cardinal Mooney High School v. Michigan High School Athletic Association*.²¹⁴

In a separate dissenting opinion, Circuit Judge Moore argued that the case was moot and that no case or controversy existed.²¹⁵ The judge used the analysis in *Jordan v. Indiana High School Athletic Association* to support the notion that no controversy exists when

While the court did not imply that the Ann Arbor school district's purpose was redshirting in this case, it still determined that allowing a waiver would threaten the regulation's purpose of deterring redshirting. *See id.*

209. *See id.*

210. *See id.* Further, the court also noted that it did not fully determine whether the MHSAA was a public or private entity operating a place of public accommodation. *See McPherson*, 119 F.3d at 463. This issue was left unaddressed by the district court. *See id.* By not directly answering the question, the court left it unclear whether the MHSAA is even covered under the Rehabilitation Act. *See id.*

211. *See id.* at 464.

212. *See id.* (Merritt, J., dissenting).

213. *See McPherson*, 119 F.3d at 464 (Merritt, J., dissenting) (citing *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, No. 89-6450, 1990 WL 104036, at *4 (6th Cir. July 25, 1990) (noting unfairness in penalizing schools that followed district court rulings)).

214. *See McPherson*, 119 F.3d at 464 (Merritt, J., dissenting); *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 467 N.W.2d 21, 24 (Mich. 1991). In *Cardinal Mooney*, the state supreme court upheld the validity of the retroactive punishment rule based upon the agreement of MHSAA member schools to submit to regulations as a condition of membership. *Id.* For a complete discussion of *Cardinal Mooney*, see *supra* notes 89-96 and accompanying text.

215. *See McPherson*, 119 F.3d at 464-65 (Moore, J., dissenting). Judge Moore noted that when a case becomes moot on appeal, the court is without jurisdiction to consider the merits of the appeal. *See id.* (Moore, J., dissenting) (citing *Honig v. Doe*, 484 U.S. 305, 317 (1988)).

the school district is not part of the appeal.²¹⁶ Judge Moore disregarded the reasoning in *Pottgen v. Missouri State High School Activities Association*, which involved a clear intent of the athletic association to impose sanctions on the district, by noting that the cases conflict on the issue of whether the plaintiff still has a stake in the outcome.²¹⁷ Finally, Judge Moore contended that since the school district is not adverse to the MHSAA, the entire controversy should be vacated as moot and that the injunction should be vacated by the district court.²¹⁸

B. Critical Analysis

Overall, the *McPherson* majority aligned itself with other cases that refuse to allow eligibility rule waivers for student-athletes with disabilities.²¹⁹ This view still has not emerged as the clear majority rule since other courts have held the opposing position.²²⁰ Of the different decisions regarding the eligibility of student athletes with disabilities, *McPherson* is the first to fully decide the relation of the Rehabilitation Act and ADA to maximum semester rules. While the court may have correctly interpreted the mootness issue, the relation of the Rehabilitation Act to the ADA and the necessity of semester regulations, it should have been persuaded by the argument that a semester regulation waiver was a reasonable modification.

216. See *id.* at 466 (Moore, J., dissenting); *Jordan v. Indiana High Sch. Athletic Ass'n*, 16 F.3d 785, 788 (7th Cir. 1994) (declining to find existence of case or controversy when school district was no longer party to suit).

217. See *McPherson*, 119 F.3d at 466 (Moore, J., dissenting); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 928 (finding controversy not moot since athletic association intended to sanction school district). Judge Moore noted that in *Jordan*, the Seventh Circuit found the controversy moot because the plaintiff had merely participated on the team and had not achieved individual records. See *McPherson*, 119 F.3d at 466 (Moore, J., dissenting) (citing *Jordan*, 16 F.3d at 788).

218. See *McPherson*, 119 F.3d at 467-68 (Moore, J., dissenting).

219. See *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1035, 1037 (6th Cir. 1995) (holding age-eligibility rule was valid under Rehabilitation Act and ADA); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 930-31 (8th Cir. 1994) (permitting enforcement of maximum age rule against learning disabled student). But see *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 671 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996) (enjoining athletic conference from prohibiting disabled student's participation in athletics); *Johnson v. Florida High Sch. Activities Ass'n, Inc.*, 899 F. Supp. 579, 586 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172, 1173 (11th Cir. 1997) (entitling student to preliminary injunction after showing of likelihood of success on merits).

220. See, e.g., *Dennin*, 913 F. Supp. at 671 (enjoining athletic conference from prohibiting disabled student's participation in athletics); *Johnson*, 899 F. Supp. at 586 (granting injunction against enforcement of maximum age rule).

1. *Mootness*

By initially deciding that the case was not moot, the Sixth Circuit followed its earlier ruling in *Sandison v. Michigan High School Athletic Association, Inc.* that both parties still retained a legal interest in the proceedings.²²¹ Past circuit court rulings split on whether an appeal was moot when the student played through a season and graduated.²²² The *McPherson* court, however, differentiated itself from past circuit court rulings by noting that the plaintiff had specifically requested that the MHSAA refrain from taking action against the school district.²²³ This would make the decision consistent with the Seventh Circuit's decision in *Jordan v. Indiana High School Athletic Association* since in that case, the plaintiff did not seek to enjoin the athletic association from punishing the school.²²⁴ Nevertheless, the *McPherson* decision still remains in conflict with the Eleventh Circuit's decision in *Johnson v. Florida High School Activities Association, Inc.*, which ruled that despite having the plaintiff seek to enjoin enforcement of penalties against his high school, the case was still moot.²²⁵ The Sixth Circuit's position, however, is appropriate when considering *McPherson*'s specific request for relief and the MHSAA's insistence on penalizing the school district.

2. *Issuance of preliminary injunction*

In examining the issuance of the injunction, the court's analysis of the relation of the Rehabilitation Act and ADA was also consistent with the current viewpoint regarding the two acts.²²⁶ The acts

221. See *McPherson*, 119 F.3d at 458-59; *Sandison*, 64 F.3d at 1030 (finding that plaintiffs retained interest in preventing athletic association from erasing records and performances).

222. Compare *Pottgen*, 40 F.3d at 928 (concluding live controversy existed when injunction prohibited imposition of sanctions on high school) with *Johnson*, 102 F.3d at 1173 (stating that no case and controversy existed when student had graduated and high school was not party to suit); *Dennin*, 94 F.3d at 100, 102 (dismissing appeal as moot since student played and finished regular season); and *Jordan v. Indiana High Sch. Athletic Ass'n, Inc.*, 16 F.3d 785, 787-89 (7th Cir. 1994) (ruling that no live controversy existed between student and athletic association after student had graduated and high school was not party to suit).

223. *McPherson*, 119 F.3d at 458.

224. *Jordan*, 16 F.3d at 786-87; see also *Dennin*, 94 F.3d at 100 (recognizing that no further relief was sought by plaintiffs other than waiver of age rule).

225. *Johnson*, 102 F.3d at 1173. In *Johnson*, the plaintiff's complaint specifically requested an injunction forbidding the activities association from penalizing the school for his participation in interscholastic athletics. *Id.* The Eleventh Circuit dismissed the case as moot since the plaintiff's high school was not a party to the case. See *id.*

226. See *Weber*, *supra* note 19, at 1097 (noting how Congress intended section 504 and title II of ADA to be more similar than different). Since section 504 of the Rehabilitation Act is the basis for the ADA, the general provisions, regulations and

have virtually the same requirements with the exception that Rehabilitation Act claims require that the program receives federal funding.²²⁷

a. ADA claim

In discussing the ADA claim, the court properly determined that it had to decide whether or not McPherson could meet the requirements of the program, with or without a reasonable accommodation.²²⁸ If McPherson was "otherwise qualified" and the MHSAA could have, but did not, reasonably accommodate his disability, then McPherson could demonstrate discrimination by the MHSAA against him.²²⁹ This analysis directly follows the ADA's definition of a "qualified individual."²³⁰

The majority concluded that McPherson was not "qualified" and that a reasonable accommodation was not possible.²³¹ The court based this determination on its view that the semester rule was a necessary regulation and on its conclusion that waiver of this rule would be a fundamental alteration.²³² In determining that the semester rule was a necessary requirement, the Sixth Circuit remained consistent with its prior holding in *Sandison v. Michigan High School Athletic Association, Inc.*²³³ and the Eighth Circuit's decision in *Pottgen v. Missouri State High School Activities Association*²³⁴ that the age requirement was a necessary requirement. Considering the regulation's stated purposes, the court's determination that the semester rule is a necessary requirement was reasonable.²³⁵

judicial interpretations of the ADA parallel those of section 504. See *id.* at 1120. See also *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996) (stating that analysis of ADA claims roughly coincides with Rehabilitation Act claims).

227. For a discussion of the relation between the two acts, see *supra* notes 51-58 and accompanying text. See also Weber, *supra* note 19 (comparing ADA to Rehabilitation Act).

228. See *McPherson*, 119 F.3d at 460-64. In analyzing an ADA claim, the court must assess the ability of the individual to work with accommodations. See *Wilkinson*, *supra* note 49, at 929. In an employment situation, the court must consider the individual and the job to determine if a reasonable modification would allow the individual to perform the essential functions of the position. See *id.* at 912.

229. See *McPherson*, 119 F.3d at 460-61.

230. See 42 U.S.C. § 12131(2) (1994) (defining "qualified individual" as individual with disability who can meet essential eligibility requirements for program with or without reasonable modifications).

231. See *McPherson*, 119 F.3d at 462.

232. See *id.* at 461-62.

233. 64 F.3d 1026, 1034 (6th Cir. 1995).

234. 40 F.3d 926, 929-31 (8th Cir. 1994).

235. For a discussion of the purposes of the maximum semester regulation, see *supra* note 159.

The court, however, recognized that the semester rule permitted waivers while the age rule did not.²³⁶ This difference might be enough of a distinction to consider a waiver of the semester rule to be a reasonable accommodation rather than a fundamental alteration since the MHSAA already permitted waivers for this rule. The *McPherson* court, however, declined to find a waiver of the semester regulation to be a reasonable modification.²³⁷ The Sixth Circuit's position appears to disregard the spirit of the laws when it strictly applies the test that a modification is not reasonable if it would "fundamentally alter the nature of the service, program, or activity."²³⁸ Since the semester rule already allows exceptions, allowing a waiver would not necessitate a fundamental change for the MHSAA's eligibility requirements and should be considered a reasonable accommodation. The mere existence of a mechanism for semester rule waivers also seems to imply that the rule is not a necessary requirement.

b. Rehabilitation Act claim

By rejecting the ADA claim, the court was consistent in disposing of the Rehabilitation Act claim. In addition to all of the ADA requirements, claims under the Rehabilitation Act require that the program receives federal funding.²³⁹ Therefore, failure to meet the more limited standards of the ADA automatically results in a failure to meet the higher standards of the Rehabilitation Act. The *McPherson* court, however, did not fully determine whether the MHSAA was a public entity that the Rehabilitation Act covers.²⁴⁰ Athletic associations do not necessarily qualify as a "public entity" under the Rehabilitation Act or the ADA.²⁴¹ Since the court failed

236. See *McPherson*, 119 F.3d at 461.

237. *Id.* at 462.

238. 28 C.F.R. § 35.130(b)(7) (1997). See also Julia V. Kasperski, Comment, *Disabled High School Athletes and the Right to Participate: Are Age Waivers Reasonable Modifications Under the Rehabilitation Act and the Americans with Disabilities Act?*, 49 BAYLOR L. REV. 175, 196 (1997) (characterizing courts that do not view waivers reasonable as ignoring "spirit of the anti-discrimination statutes").

239. 29 U.S.C. § 794(a) (1994).

240. *McPherson*, 119 F.3d at 463. The district court did not address this issue. See *id.* The lower court only noted that the athletic association was subject to the ADA either under Title II as a public entity or under Title III as a private entity operating a place of public accommodation. See *id.*

241. See 29 U.S.C. § 794(a) (1994) (covering programs or activities "receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service"); 42 U.S.C. § 12131(1) (1994) (defining "public entity" to refer to any "agency, special purpose district, or other instrumentality of a State or States or local government"). See also *Hoot v. Milan Area Schs.*, 853 F. Supp. 243, 251 (1994) (failing to conclude with degree of certainty whether MHSAA is public entity).

to make that determination, a successful McPherson ADA claim may or may not fulfill the elements for a claim under the Rehabilitation Act.

c. Suggested approach

Instead of the *McPherson* approach, courts should apply the Rehabilitation Act and the ADA to certain cases involving athletic association maximum semester rules. One of the main purposes for high school regulations prohibiting redshirting is to prevent competition between individuals differing in strength, ability and experience.²⁴² If the student has a legitimate disability and no redshirt abuse seems evident, courts should issue and uphold injunctions based on Rehabilitation Act and ADA claims as a reasonable modification of the program.²⁴³ Such modifications would be especially reasonable in states where athletic associations permit waivers of some or all of their eligibility requirements²⁴⁴ because the athletic associations already allow deviations from the set requirements in these jurisdictions. This approach is preferable since the Rehabilitation Act and ADA were specifically enacted to help accommodate persons with legitimate disabilities in as many aspects of society as possible.²⁴⁵

V. IMPACT

With the *McPherson* decision, the Sixth Circuit has effectively disallowed the use of the Rehabilitation Act and ADA by athletes with disabilities to waive eligibility requirements. The Sixth Circuit is the first circuit court to address the applicability of the two anti-discrimination statutes to maximum semester rules. As a result, the *McPherson* decision will set the precedent regarding the application of the disability statutes to maximum semester regulations for circuit courts across the country.

The Sixth Circuit has concluded that semester rules are a necessary requirement.²⁴⁶ It also ruled that waiver of these rules, which are allowable, would constitute a fundamental alteration in the program.²⁴⁷ This interpretation of semester rules indicates that the

While the MHSAA is a private association, it was established by state law. See *Hoot*, 853 F. Supp. at 250 (citing MICH. COMP. LAWS ANN. § 380.1289(2)).

242. See WONG, *supra* note 4, at 277-78 (noting justification for redshirting).

243. See WONG, *supra* note 4, at 322 (stating that age rules may be unreasonable when applied to older disabled students).

244. See, e.g., MHSAA CONST., art. VII, § 4(E) (allowing waiver of all eligibility regulations except for maximum age).

245. See *supra* notes 19 & 49-50 and accompanying text.

246. See *McPherson*, 119 F.3d at 461.

247. See *id.*

court will consider other regulations, besides those that are non-waivable, as necessary requirements. By characterizing the waiver to be a fundamental alteration, the Sixth Circuit also casts doubt onto what constitutes a reasonable modification. Potential plaintiffs are now limited to claims that involve a requirement that the court does not consider necessary and a modification that the court deems reasonable.

The court also supported the efforts to enforce eligibility regulations to discourage redshirting and other anti-academic practices. Part of the court's concern in denying a waiver was that *McPherson* was not diagnosed as learning disabled until after his semester eligibility had run its course.²⁴⁸ While abuse was probably not present in this case, the majority did not want to encourage overzealous coaches and athletic programs elsewhere to try and obtain a waiver through claiming a disability. High school athletic programs are now considerably limited from trying to use students, who may or may not have a legitimate disability, that have surpassed eligibility requirements. Despite this severe limitation, the majority appears to leave some room open for athletic programs to use students with legitimate disabilities that have been diagnosed for a while.

With regard to students with disabilities, the *McPherson* decision strikes a further blow to their hopes of participating fully in athletics. Coupled with its decision in *Sandison v. Michigan High School Athletic Association, Inc.*,²⁴⁹ the Sixth Circuit has instituted a policy of disallowing the application of disability legislation to obtain a waiver of an athletic regulation. While the court effectively followed precedent and used mostly sound reasoning in its judgment, the *McPherson* decision still unfairly penalizes student-athletes with disabilities who seek to use all of their athletic eligibility. The decision runs counter to the policy of enabling the disabled to take part completely in daily life.²⁵⁰ Until courts adopt this policy, decisions like *McPherson* will further contribute to the widespread discrimination and lesser treatment received by people with disabilities.

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248. See *id.* at 463.

249. *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1034 (6th Cir. 1995) (holding waivers of necessary requirements to be unreasonable modifications).

250. See Weber, *supra* note 19, at 1089-90 (noting that section 504 of Rehabilitation Act is key to "enabling persons with disabilities to participate in the fullness of daily life in this country").

